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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NO. 81-

MARGE PAYNE, et al.,

Petitioner,

-v-

BOBBIE BROOKS, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is the standard of McDonnell-Douglas v. Green 411 U.S. 792 (1973), requiring plaintiffs to show that they applied for positions satisfied where union officials request reemployment on behalf of former employees who were recently severed due to a plant closing?

2. Did the Court of Appeals properly apply the standards of McDonnell-Douglas v. Green, 411 U.S. 792 (1973), in determining that petitioners had failed to establish a Title VII violation because they had not formally reapplied for employment after their employer had terminated them and had given them severance pay due to their plant being closed, but where it was shown that subsequent thereto the employer hired new white employees into positions for which petitioners were qualified at another nearby plant which had remained open and the employer never

notified petitioners of the openings although union officials had requested that petitioners be considered for the available positions?

3. To determine whether the futility doctrine as set forth in International Brotherhood of Teamsters v. United States, 431 U.S. 324, 97 S. Ct 1843 (1977), applies to a case where former employees ask their union officials to seek employment on their behalf and no other formal applications from the former employees are submitted?

4. Whether the futility doctrine set forth in International Brotherhood of Teamsters v. United States, 431 U.S. 324, (1977), is applicable to a situation where former employees first learning of new white employees being hired into positions for which they are qualified decide to initiate charges of discrimination with the Equal Employment Opportunity Commission

rather than filing formal applications for reemployment?

5. Is the futility doctrine as set forth in International Brotherhood of Teamsters v. United States 431 U.S. 324, (1977), applicable to a situation where petitioners are discouraged from reapplying for positions with their former employer because they are led to believe that there is no work available with their employer who closes their plant and severs them because of a business slowdown?

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MARGE PAYNE, et al.,

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BOBBIE BROOKS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To The United States Court Of Appeals
For The Sixth Circuit

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, affirming a decision of the United States District Court for the Northern District of Ohio, Eastern Division.

OPINIONS BELOW

The opinion of the United States Court of Appeals has not yet been officially

reported. It is set forth in the Appendix, infra, at pp. A-58 - A-60. The opinion of the United States District Court can be found at 505 F. Supp. 707, (D.C. Ohio, 1980). It is also set forth in the Appendix, infra, at pp. A-1 - A-57.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was rendered and filed on April 7, 1982. The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. Sect. 1254(1).

STATUTORY PROVISION INVOLVED

Title 42 U.S.C. Sect. 2000e, et sec., Title VII of the Civil Rights Act of 1964, as amended, and Title 42 U.S.C. Sect. 1981.

STATEMENT OF THE CASE

The petitioners are a class of sixty-nine blacks who were severed from employment by the defendant company on or about January, 1976 from the respondent's Kelley

Avenue, Cleveland, Ohio Distribution Center. The Kelley Distribution Center always had a predominantly black work force.

The defendant also maintained a distribution center in Solon, Ohio which is a suburb of Cleveland, and which has less than a one percent black population. The Solon plant is located approximately thirty miles from the Cleveland plant. Both the Kelley and Solon plant employees performed the same duties.

The Solon Distribution Center was first opened on or about April, 1971 and always had a predominantly white work force.

In October, 1975, the defendant notified the International Ladies Garment Workers Union, who represented the Kelley employees, that the company had decided to close the Kelley Distribution Center and to keep open the Solon Distribution Center. The defendant decided to terminate 75 Kelley employees, including the

69 black petitioners herein and 6 white employees and to transfer 29 Kelley Distribution Center employees out to the Solon Distribution Center. The 29 Kelley Distribution Center employees who were transfered to Solon when the Kelley Plant was closed, were placed in a separate wing of the Solon facility which was separate from the Solon wing employees' work area.

The Director of Distribution, Charles Gabele, by a letter dated December 31, 1975, forwarded a severance letter and a severance check amounting to $20 per year of service to all 75 Kelley employees who were being severed.

The defendant company did not terminate or layoff any of the Solon Distribution Center employees. At the time that the petitioners were severed from the Kelley facility, the Solon Distribution Center had only one black employee.

Company officials told the union in October 1975 that the reason they were closing the Kelley Distribution Center was due to a business slowdown and a lack of work. The union officials requested that the Kelley employees be placed on a preferential hiring list for any positions that would become available at the Solon Distribution Center. The company rejected this request indicating that there would be no openings in the forseeable future. The union officials then requested severance pay for those Kelley employees who were to be terminated. This included employees who were still eligible for recall under the terms of the collective bargaining agreement between the company and the union. Under said agreement, employees could remain on layoff for up to one year without losing their seniority right and their right to recall.

Approximately 30 of the petitioners were employed at the Solon Distribution Center in September of 1975, immediately prior to their being severed. The Kelley employees with the exception of one or two were all placed on a third shift at Solon. While the Kelley employees were employed at Solon in September of 1975, certain racial problems developed between the white Solon employees and black Kelley employees.

Within one week after the racial problems developed between the Solon and Kelley employees in September of 1975, the company laid off all of the 30 Kelley employees who were working at Solon. The Kelley employees reamined on layoff until they were severed by the company in January of 1976.

During the last three months from October 1975 through the end of 1975, the

company continued to hire new employees at Solon. Approximately 41 new employees were hired at Solon during this time, nearly all of whom were white employees who had no prior work experience. None of the laid off Kelley employees who had worked at Solon were notified of any of these job openings.

After the petitioners herein were severed by the company, the company hired new employees to fill openings which occured at the Solon facility. During 1976 and up to August, 1977, when this instant lawsuit was filed, the defendant company hired 54 new employees at the Solon Distribution Center. From the period from January 1976 through December 1976, the defendant company hired 37 new employees, 35 of whom were white.

The new employees were hired by Charles Gabele, who was the same individual who had sent petitioners their

severance letter dated December 31, 1975. Gabele, as well as other company officials doing the hiring at Solon, admitted that they never notified any of the severed Kelley employees of the openings that became available at Solon during 1976 and up to August 1977.

In August, 1977, immediately after this lawsuit was initiated by petitioners, the defendant company notified all 69 class members of opportunities at the Solon Distribution Center. Approximately 25 to 30 of the severed Kelley employees returned to work at Solon in August or September, 1977.

Gabele admitted that the company relied on walk-in applicants to fill openings at Solon during 1976 and up to August, 1977. The defendant company did not advertise the job openings at Solon in any newspaper during this time. Because the city of Solon where the plant was

located was less than one percent black, most of the walk-in applicants were white.

Most significantly, throughout 1976 and 1977, two union officials continually asked Gabele to consider hiring the severed Kelley employees before hiring new applicants to fill openings which were occuring in Solon during this time. Al Gargiulo testified that in 1976 and 1977 he saw Gabele at least once or twice a week and on most of those occasions when he asked Gabele to consider hiring the severed Kelley employees for openings at Solon, Gabele never responded to Gargiulo's request and would merely attempt to avoid the question.

Defendant, at trial in the District Court, attempted to justify their refusal to rehire the petitioners herein by asserting that petitioners had failed to apply for positions at Solon after they had been severed from Kelley. The petitioners

responded during the trial that they had applied, through their union officials, for positions at Solon. Further, petitioners stated that it would have been futile for them to apply for positions because they had learned that the defendant company was hiring new white employees at Solon and they reasonably believed that they were being discriminated against because of their race.

The petitioners first learned of the new hiring at Solon in May or June of 1976 from another black employee who worked in another area at the defendants' Kelley Avenue facility. Immediately after petitioners first became aware of the defendants hiring new white employees at the Solon plant, they filed charges of discrimination with the Equal Employment Opportunity Commission. Petitioners charges allege that, " Whites have been hired at Solon subsequently on jobs for

which I am qualified."

Immediately after they were given their severance pay, the petitioners sought out their union officials for assistance. At a union meeting held in early January, 1976, the petitioners signed a paper indicating that they wanted their jobs back, or jobs at Solon. It was after this meeting that union officials went to the company to request that the company consider hiring the terminated petitioners for openings which were occuring at the Solon facility.

It was also established at the trial herein that a formal application was not always necessary for employment at the Solon facility. Several white employees were permitted to transfer from the Kelley plant to the Solon plant without having submitted formal applications for transfer. Further, many of the white employees hired at Solon during 1976 and 1977 were

hired well after they had first applied for positions at Solon. Some were not hired until approximately two months after they had submitted their applications. The defendant company had contended that the reason a formal application was necessary was to show a present interest in employment. Petitioners produced all of the applications of those hired at Solon during the period in question and they established that the defendant didn't always hire immediately after an application was submitted.

After trial and upon consideration of all of the evidence, the District Court concluded that because none of the petitioners had applied for positions at Solon after they were severed, they were not entitled to relief under Title VII of the 1964 Civil Rights Act or 42 U.S.C. Section 1981. The District Court relied

on McDonnell-Douglas v. Green 411 U.S. 792, (1973) stating that, "Intercession on behalf of the employees by the union leaders in 1975, 1976 or 1977, can not be considered an application." The District Court then concluded that the plaintiffs had failed to satisfy the application requirements set forth in the decision in McDonnell-Douglas Corp., v Green 411 U.S. 792, (1973).

Further, the District Court found that the futility doctrine as ennunciated in International Brotherhood of Teamsters v. United States, 431 U.S. 324, 97 S. Ct. 1843 (1977), did not apply in the instant case. The District Court stated that the futility doctrine did not apply because there was no evidence that petitioners believed it would have been futile for them to apply for positions at Solon due to discrimination.

Upon appeal, the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court. The Court of Appeals found that petitioners had failed to formally apply for positions at Solon after they had been terminated and therefore had failed to satisfy the application requirement of McDonnell-Douglas v. Green. Further, the Sixth Circuit Court of Appeals determined that the futility doctrine did not apply in the instant case.

Petitioners seek to have this Court review the Sixth Circuit Court of Appeals decision with respect to its holding that petitioners burden of proof included establishing that they had formally applied for positions with the company after they had been severed. Further, petitioners seek to have the Court review the Sixth Circuit Court of Appeals decision that held that the futility doctrine did not apply.

REASONS FOR GRANTING THE WRIT

1. To Resolve The Important Issue Concerning The Required Burden Of Proof In A Refusal To Hire Case Under Title VII, Where A Company Is Put On Notice By Union Officials That Former Employees Are Seeking Employment, But The Employer Does Not Consider The Former Employees For Job Openings Which Occur Because The Former Employees Had Not Submitted Formal Applications For Reemployment.

In McDonnell-Douglas v. Green, supra., this Court held that the necessary elements of proof required of plaintiff in establishing a prima facie case of hiring discrimination, included: 1) that plaintiffs show that they belong to a racial minority; 2) that they applied and were qualified for jobs for which the employer was seeking applicants; 3) that dispite their qualifications, they were rejected; and, 4) that after their rejection the position remained open and the employer continued to seek applicants.

The question presented in the instant case is whether petitioners satisfied their

burden of proof concerning the application requirement set forth in McDonnell-Douglas by establishing that defendant company supervisors were aware of petitioners desire for reemployment through requests made by their union officials.

It is the petitioners contention that if company supervisors doing the hiring at Solon knew that petitioners were seeking employment, then their failure to notify petitioners of openings at Solon for which they were qualified can only be considered discriminatory.

In Hansbury v. University of California 596 F. 2d 944, (10th Cir., 1979) the plaintiff did not formally apply for reemployment with defendant university after she had been laid off from her job. Subsequently, males with less qualifications were hired to fill openings for which plaintiff was qualified.

The Tenth Circuit held that if plaintiff could show that defendants were aware of her continued desire to be considered for employment, than, under the futility doctrine, it would constitute a functional equivalent of an application even though plaintiff had not in fact made such an application. The Court held that the company's awareness of plaintiff's desire for employment could constitute a functional equivalent of an application.

The evidence presented at trial in the District Court clearly established that defendant company supervisors who were responsible for hiring new employees at Solon were aware of petitioners desire for employment. First, the union officials made frequent inquiries with company supervisors requesting that they consider hiring the petitioners for openings at Solon.

Al Gargiulo, Union Business Agent, and

Chuck Dabila, Union Steward, both stated that they frequently asked Gabele throughout 1976 and 1977 to consider hiring the terminated petitioners from Kelley for positions that were available at the Solon Distribution Center. Gargiulo, whose testimony was credited by the District Court, testified that in 1976 and 1977 he met with Gabele at least once or twice a week and on most of those occasions he would ask Gabele to consider hiring the severed Kelley employees for openings at Solon. Gabele never responded to either Gargiulo's or Dabila's request and would merely attempt to avoid the question. Again, during this time, Gabele was hiring new white employees at Solon.

Further evidence that defendant company supervisors were aware of petitioners interest in seeking employment, is shown by the fact that the same supervisors that were doing the hiring at Solon were involved

in terminating the petitioners and in many cases had actually supervised the petitioners at the Kelley Distribution Center prior to their severance. In addition, several of the petitioners contacted company supervisors after they had been severed, requesting letters of reference to use in seeking employment elsewhere. The company supervisors never told any of these individuals requesting letters that there were openings at the Solon Distribution Center.

In Pearson v. Furnco Construction Co., 563 F.2d 815, (7th Cir., 1977) the Court held:

> "That plaintiffs had made Furnco sufficiently aware of their interest in firebrick jobs so that Furnco's failure to notify them..., could only have been a deliberate avoidance of considering plaintiffs for employment."

Further, petitioners contend that applicable labor decisions involving the National Labor Relations Board should be

controlling in the instant case. In N.L.R.B. v. Brown & Root, Inc., 203 F.2d 139, (8th Cir., 1953) the Eighth Circuit held that a union could represent striking employees in applying for reinstatement on their behalf. See also, Laidlaw Corp., v. N.L.R.B., 414 F.2d 99 (7th Cir. 1969).

2. To Clarify The Standard Applicable In A Title VII Case Involving Employees Being Severed Due To A Plant Closing And The Employer Then Hiring New Employees At A Nearby Plant Without Notifying The Former Employees Of The Openings For Which They Are Qualified

It is the contention of petitioners that the District Court and the Court of Appeals erred by placing too great a burden on the plaintiffs to establish that they had applied for positions at Solon after they had been severed in order to establish a Title VII violation. Petitioners contend that it was only necessary for them to establish that they were denied equal employment opportunities with respect to hiring

opportunities at the Solon plant during 1976 and up to August 1977.

As applied to a termination and then a subsequent refusal to rehire case, petitioners have argued that in order to establish a prima facie case of racial discrimination they need only show that they are members of a protected minority under Title VII, that they were terminated, and that they were qualified to fill positions from which they were terminated and that they were in effect, replaced with white employees. See Marks v. Prattco, Inc., 607 F.2d, 1153 (5th Cir., 1979); and Whiting v. Jackson State University, 616 F.2d, 116 (5th Cir., 1980).

This Court clearly set forth the full meaning of the term disparate treatment in International Brotherhood of Teamsters v. United States, supra., wherein it held;

> "Disparate treatment" such as is alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. See e.g., Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265-266, 97 S.Ct 555, 563-565. Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII. See e.g., 110 Cong. Rec. 13088 (1964) remarks of Sen. Humphrey, ("What the bill does...is simply to make it an illegal practice to use race as a factor in denying employment. It provides that men and women shall be employed on the basis of their qualifications, not as Catholic citizens, not as Protestant citizens, not as Jewish citizens, not as colored citizens, but as citizens of the United States")."

The District Court as well as the Court of Appeals did not correctly apply the law with respect to disparate treatment cases to the evidence as established on record. The lower courts only concerned themselves

with whether or not the plaintiffs had formally applied for positions at Solon after they had been severed which was not an issue crucial to determining whether or not plaintiffs were denied equal employment opportunities because of their race.

In Mitchell v. Mid-Continent-Spring Co., 583 F.2d, 275 (6th Cir., 1978) the Sixth Circuit considered the company's defense that there were no female applicants for promotion and therefore, the company never had occasion to discriminate. The Sixth Circuit held that:

> "The standard of this Circuit under Title VII is that females must have equal employment opportunities not merely that their applications, if any, be processed fairly."

The Sixth Circuit concluded that on the basis of substantial evidence, the defendant company exhibited the requisite disregard for the consequences of its acts to satisfy Title VII.

In this case, there is substantial evidence that petitioners were denied equal employment opportunities by the company because of their race. First, in October of 1975, when the defendant company first notified the union of its decision to close the Kelley Distribution Center, the defendant refused to abide by the union's request to place the Kelley employees on a preferential hiring list instead of terminating them.

One of the most significant evidentiary facts is that defendant company continued to hire new white employees at the Solon facility during the last three months of 1975 while at the same time they were in the process of terminating the Kelley employees. The defendant company did not offer an explanation as to why they continued to hire new employees at Solon during the same time period when they were in the process of severing the plaintiffs

herein. The petitioners were never offered the opportunity to transfer to positions at Solon during the last three months of 1975 because they were never notified of such openings.

After severing the Kelley employees, the defendant company continued to hire new employees at the Solon facility throughout 1976 and up to August 1977. Gabele and other company supervisors doing the hiring at Solon chose to ignore the experienced severed Kelley employees who were readily available to fill openings at Solon. Gabele admitted that the severed Kelley employees were more knowledgable about the positions at Solon than were the new applicants who were hired by the defendant.

Evidence of defendant denying equal employment opportunities at the Solon facility is clearly shown by the fact that Gabele as well as other company supervisors

failed to notify or even attempt to notify any of the severed Kelley employees of the openings and did not advertise job openings in any newspaper during this time. Because the city of Solon where the plant was located was less than one percent black, most of the walk-in applicants were white.

And most significantly, Gabele and the other company supervisors ignored the request of union officials to consider hiring the severed Kelley employees before hiring new applicants to fill the openings at Solon. Gabele's only explanation for refusing to notify any of the severed employees of openings at Solon was that he did not do so because the union had asked for severance pay for these employees.

Thus, under the standards set forth by this Court in disparate treatment cases, petitioners were only required to establish that they were members of a protected minority, that they were terminated, and that

they were qualified to fill positions for which whites were subsequently hired. Both the lower District Court and Court of Appeals applied the incorrect burden of proof required in disparate treatment cases. It was not essential for petitioners to have applied for positions at Solon subsequent to their being terminated due to a lack of work in order for petitioners to have established a Title VII violation. Rather, it was only essential that they establish that they were denied equal employment opportunity because of their race which the evidence clearly indicates.

3. To Clarify The Standard Applicable In A Title VII Case Concerning The Futility Doctrine And Whether Or Not It Applies To A Case Where Employees Are Led To Believe That There Is No Work Available By Their Employer Who Closed Their Plant And Severed Them Because Of A Business Slowdown And The Employees Request Their Union Officials To Seek Reemployment For Them But Subsequent Thereto, They Learn Of New Whites Being Hired At A Nearby Plant Into Positions For Which They Are Qualified, But Rather Than Formally Applying For Reemployment, They Immediately File Charges Of Race Discrimination

With The Equal Employment Opportunity Commission

This Court has specifically addressed the futility issue in International Brotherhood of Teamsters v. United States, supra., wherein the Court held that it was not absolutely essential for a claimant to formally apply for a job in order to be covered by the 1964 Civil Rights Act. The Court stated:

> "The denial of Title VII relief on the ground that the claimant had not formally applied for the job could exclude from the Act's coverage the victims of the most entrenched forms of discrimination. Victims of gross and prevasive discrimination could be denied relief precisely because the unlawful practices had been so successful as totally to deter job applications from members of minority groups. A per se prohibition of relief to nonapplicants could thus put beyond the reach of equity the most invidious effects of employment discrimination--those that extend to the very hope of self-realization. Such per se limitation on the equitable powers granted to courts by Title VII would be manifestly inconsistent with the "historic purpose of equity to 'secure complete justice' and with the duty of courts in Title VII cases to render a decree which

> will so far as possible eliminate the discriminatory effects of the past." Albermarle Paper Co. v. Moody, 422 U.S. at 418.

The District Court found the futility doctrine did not apply in the instant case because the futility was not caused by discrimination but rather by an apparent lack of jobs. It is true that the petitioners were led to believe that they were being severed by the defendant due to a lack of work. Under these circumstances, they reasonably believed that it would have been futile for them to apply for positions with the defendant after they had been severed. However, they did ask their union officials to seek reemployment for them. The union officials never got back to petitioners after their request was made which again led petitioners to believe that there were no openings.

In Hansbury v. Regents of University of California, supra., the plaintiff alleged

in her E.E.O.C. complaint that she had been laid off from her job and that males with less qualification had been hired to fill openings subsequent to her layoff. The plaintiff in Hansbury did not formally reapply for reemployment with the defendant university. The Tenth Circuit however, held that if the plaintiff could show that the defendants were aware of her continuing desire for employment, then under the futility doctrine it would constitute a functional equivalent of an application even though plaintiff had not in fact made such an application. Specifically, the Tenth Circuit held:

> "Her theory is apparently based on the doctrine of 'futility', for she makes much of indications by LASL Personnel that she simply would not be considered again for employment at LASL. Under this doctrine, the plaintiff need not file applications in order to have standing to assert a Title VII claim, if doing so would be futile."

Likewise, in the instant case, the peti-

tioners did not have to file formal applications with the defendant after their termination in order to have standing to assert their Title VII claim. Like in Hansbury, the defendant by severing petitioners was indicating to petitioners that there were no jobs available for them.

It should also be noted that immediately after first learning that the defendant company was hiring whites at Solon, the petitioners filed charges of discrimination with the Equal Employment Opportunity Commission. The charges stated in part, that, "Whites have been hired at Solon subsequently on jobs for which I am qualified." Obviously, the petitioners were clearly stating in their charges of discrimination that they believed they were being discriminated against, and that it was futile for them to apply for positions at Solon for that reason.

In Hailes v. United Airlines, 464 F.2d 106, 1009 (5th Cir., 1972) the plaintiff, a male, charged sex discrimination in the hiring of stewardesses and flight attendants. Plaintiff had not even applied for a job but the court held that a complaint of sex discrimination need not allege that the plaintiff actually applied for and was rejected for a job but that it is sufficient to inculcate a reasonable belief on plaintiffs part that even applying for the job was futile.

Therefore, it is clear from the evidence that the reason petitioners thought it would be futile to apply for positions at Solon was because, 1) they had just been severed and had been told there was no work available; and, 2) they subsequently learned that new white employees were being hired at Solon immediately after they had been severed.

Pursuant to this Court's ruling in International Brotherhood of Teamsters v. United States, supra., the futility doctrine was applicable to the instant case. Under these circumstances, it was not necessary for petitioners to have actually formally applied for positions at Solon after their termination in order to have established a prima facie case of a Title VII violation.

CONCLUSION

Petitioners submit that the decision of the Court of Appeals for the Sixth Circuit is in conflict with the rulings of this Court and with those of other Circuits. Petitioner therefore prays that this petition for writ of certiorari be granted.

Respectfully submitted,

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